Supreme Court, U.S.
FILED
JUN 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1838

ROBERT L. GRUEN, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM O. BITTMAN
GEORGE R. CLARK
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

ROBERT L. GRUEN, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Robert L. Gruen, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in *United States v. Robert L. Gruen, Inc.*, No. 78-5016, on April 19, 1979.[1]

---

[1]Of the remaining eight co-defendants in that case whose convictions were affirmed under the caption *United States v. John P. Foley, Jr.*, four have petitioned this Court for a writ of certiorari, No. 78-1737 (May 18, 1979) (John P. Foley, Jr., Jack Foley Realty, Inc., Colquitt-Carruthers, Inc., and John T. Carruthers, Jr.), three have timely petitioned the Fourth Circuit for rehearing and filed suggestions for rehearing *en banc* which are still pending before that Court (Bogley, Inc., Robert W. Lebling, and Shannon and Luchs Co.), and the last, Schick & Pepe Realty, Inc., has moved to stay the mandate of the Fourth Circuit pending application to this Court for a writ of certiorari.

OPINIONS BELOW

The April 19, 1979 opinion of the Court of Appeals has not yet been officially reported, but is reported at 1979-1 Trade Cas. ¶ 62,577. App. 1a.[2] The District Court's Memorandum and Order denying the defendants' pretrial motions to dismiss is reported as *United States v. Jack Foley Realty, Inc.*, 1977-2 Trade Cas. ¶ 61,678 (D. Md. 1977). App. 31a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1979. Three of the nine defendants filed timely petitions for rehearing and suggestions for rehearing *en banc* on May 3, 1979. Those petitions are still pending before the Fourth Circuit. Upon the motion of the petitioners, the mandate of the Court of Appeals was stayed on May 11, 1979, in order to permit the filing of this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the "commerce clause," Art. I, § 8, of the Constitution permit the application of § 1 of the Sherman Act, 15 U.S.C. § 1, to an alleged conspiracy to fix or maintain real estate commission rates paid by sellers of used residential real property located solely in Montgomery County, Maryland?

2. Did the trial court's instructions to the jury on the degree of criminal intent required for conviction satisfy the due process clause of the fifth amendment to the Constitution, as it applies to a felony charge under § 1 of the Sherman Act?

---

[2]References to the Appendix (App.) are to the Appendix filed by the petitioners in No. 78-1737, which is joined in and adopted by the petitioner here.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

U.S. Const., Art. I, § 8, cl. 3:

> [The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner adopts the Statement of the Case in No. 78-1737, supplemented with the following.

Robert L. Gruen, the petitioner's president, was present at the September 5, 1974, dinner held at Congressional Country Club. The only witness who testified as to any alleged statement by Mr. Gruen was Allyn J. Rickman, an unindicted co-conspirator who testified under a grant of immunity. Mr. Rickman eventually testified at trial that Mr. Gruen had said "yes" or "I am going to seven" to some uncertain question at the dinner. This was inconsistent with some of Mr. Rickman's earlier trial testimony and with his statements before trial made both to his own lawyer and to the prosecutors.

Instructions to the jury. The petitioner (and the other defendants) requested that the District Court instruct the jury that specific intent was an element of a criminal violation of Section 1 of the Sherman Act. The District Court refused to do so.

In addition to the instructions set forth by the petitioners in No. 78-1737, the District Court instructed the jury as follows:

> There are four essential elements which the Government must prove beyond a reasonable doubt in order to establish a violation of the law as charged in this case.
>
> First, the Government must prove the existence of a combination or conspiracy.
>
> Second, the Government must prove that this combination or conspiracy was an unreasonable restraint of trade or commerce.
>
> . . .
>
> The mere forming of the agreement itself is a violation of the law charged in this case.

> In order to prove the conspiracy charged in the indictment, the proof need not show that the Defendants acted willfully or with specific intent or bad purpose either to disobey or disregard the law. But the proof must show that a particular Defendant knowingly established or joined the conspiracy charged.
>
> An act is knowingly done if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reasons.
>
> . . .
>
> It would make no difference that the Defendants did not believe they were violating the law, or that they did not intend to commit the violation.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL CONCERNING THE SCOPE OF § 1 OF THE SHERMAN ACT AS IT APPLIES TO THE ACTIVITIES OF REAL ESTATE BROKERS.

The petitioner adopts the reasons of the petitioners in No. 78-1737 (pp. 6-13).

II. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS CONCERNING THE APPLICATION OF THIS COURT'S HOLDING IN *UNITED STATES* V. *UNITED STATES GYPSUM CO.*

The petitioner adopts the reasons of the petitioners in No. 78-1737 (pp. 13-18) supplemented as follows.

The District Court denied the petitioner's pretrial motion to dismiss the indictment for failure to charge specific intent based on this Court's decision in *United States v. Patten*, 226 U.S. 525 (1913). App. 45a. Likewise, it denied the petitioner's requested jury instruction on specific intent on

the same basis. Both of these rulings were made before this Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), made it clear that intent is an element of all Section 1 Sherman Act violations.[3]

In *Gypsum* this Court held that intent indeed is an element of a Sherman Act offense. Specifically, it held that:

> [A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. 438 U.S. at 435.
>
> . . .
>
> [A]ction undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. *Id.* at 444.
>
> . . .
>
> [T]he perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent. *Id.* at 446.

Thus in *Gypsum*, an instruction which precluded the jury from considering evidence that the defendants acted without this requisite knowledge invaded the jury's role as factfinder on the issue of intent. *Id.*

In reaching this conclusion, this Court carefully analyzed and distinguished the dual nature of intent in a criminal conspiracy charge — (1) the intent to join a conspiracy and (2) the intent to effectuate the object of the conspiracy. 438 U.S. at 443 & 443 n. 20.

---

[3]Briefing was also completed in the Court of Appeals prior to the *Gypsum* decision, but before argument in that case. No supplemental briefs were filed or requested by that Court.

The Court of Appeals here incorrectly concluded that there was

> no error in Judge Blair's instructions in which he told the jury *in substance* that it must find beyond a reasonable doubt *that defendants must have known* that their agreement, if effectuated, would have an effect on prices. App. 22a (emphasis added).

As the instructions set forth here make clear, the District Judge did not accomplish this goal. In fact, he had ruled that it was unnecessary for the jury to find that the Government had proven this.

Rather the District Judge instructed the jury that in order to convict it was necessary only that it find that the petitioner had agreed to join a conspiracy, that "[t]he mere forming of the agreement itself is a violation of the law charged in this case." As in *Gypsum*, this removed the fact-finder's role with respect to intent. Although the petitioner agrees that the jury could have been left to infer intent from its actions, the jury was not allowed "to consider additional evidence before accepting or rejecting the inference." *Gypsum*, 438 U.S. at 446. Here the jury was specifically instructed that the intent of the petitioner "would make no difference."

That this case involved a per se offense is irrelevant. *Gypsum* held that "[w]e are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses." 438 U.S. at 436. The per se rule means only that the Government need not prove that price-fixing, for example, effects an unreasonable restraint of trade. It does not, after *Gypsum*, allow the Court to instruct the jury that a defendant's *knowledge* of that effect is not an element of

the offense. Yet that is precisely what happened to the petitioner. *See United States* v. *Gillen*, 1979-1 Trade Cas. ¶ 62,627 (3d Cir. May 8, 1979) (Adams, J., concurring) (proof of intent required even in per se misdemeanor violations).[4]

In this first appellate review of a conviction for a felony offense under the Sherman Act it is of prime importance in the administration of the antitrust laws to set forth clearly the nature of that offense. The Court of Appeals here has ignored the teachings of *Gypsum* concerning the intent which must be proven for conviction. Given the important policies served by the antitrust laws, the petitioner respectfully suggests that certiorari must be granted to insure that the enforcement of the criminal antitrust laws remains within proper bounds.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM O. BITTMAN
GEORGE R. CLARK
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner

---

[4]Since the decision of the Court of Appeals here, the Seventh Circuit has also affirmed a felony conviction under Section 1. *United States* v. *Brighton Building & Maintenance Co.*, Nos. 77-2295 *et al.* (May 18, 1979). That Court held that the trial court's instructions satisfied *Gypsum* because price-fixing is a per se offense.

see

78

1737

79

93